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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

dc

NO. 77-6248

ORIGINAL COPY

JACQUELYN E. HUNTER,

Petitioner,

v.

GERALD WALLACE DEAN, SHERIFF,

Respondent.

Brief in support

MEMORANDUM IN SUPPORT OF CERTIORARI

Please serve:

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PREFACE

As the petitioner has pointed out and as the Court is aware, the issues presented in this petition for certiorari and the issues presented in Hopper v. Barnett, No. 77-477, are essentially identical. The petitioner in Hopper v. Barnett is a state official represented by the Attorney General of Georgia. Thus, for the reasons elaborated upon in the Hopper v. Barnett petition, the State does not oppose the granting of the writ in the instant case. While the petitioner in this case and the petitioner in Hopper v. Barnett disagree as to ultimate resolution of the two cases,[1] the Attorney General agrees that the issues presented in the cases are worthy of plenary review by the Court.

In this memorandum, the Attorney General will restate the issues presented and then briefly elaborate on why the issues are worthy of plenary review.

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[1]To a certain extent there is also disagreement as to why this case merits certiorari review. See Additional Reasons, infra.

QUESTIONS PRESENTED

1.

For purposes of equal protection analysis is wealth always a suspect classification simply because the issue arises in the context of the criminal justice system?

2.

Although there may be some uncertainty as to whether a defendant has the ability to pay a fine (and it subsequently appears that he cannot pay the fine because of indigency), does the Equal Protection Clause of the Fourteenth Amendment preclude the imposition of a probated sentence conditioned upon the payment of a fine based upon factors which include assessments as to the ability of the defendant to successfully serve a term of probation if a fine is paid first?

ADDITIONAL REASONS FOR GRANTING THE WRIT

A. Griffin, Maher, and the Tate Trilogy

In this case the petitioner argues that the decision of the Supreme Court of Georgia "does not accord with the applicable decisions of this Court." Essentially, she argues that the decision below is in clear conflict with the Tate-Morris-Williams[2] trilogy and Griffin v. Illinois, 351 U.S. 12 (1956).

While the Court may eventually agree with the petitioner, the respondent submits that the conflict perceived by the petitioner is by no means clear. The equal protection rationale of Griffin is not that thoroughly developed and the result is arguably anchored more on due process than equal protection. In terms of equal protection, Griffin may be read as narrowly holding that it is a denial of equal protection to deny an indigent his right to due process.[3]

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[2] Tate v. Short, 401 U.S. 395 (1971), Morris v. Schoonfield, 399 U.S. 508 (1970), and Williams v. Illinois, 399 U.S. 235 (1970).

[3] "There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court [-- due process as much as equal protection --] and one which effectively denies the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance." Griffin v. Illinois, 351 U.S. 12, 18 (1956).

In this case, however, the petitioner relies exclusively on the equal protection clause. Petition for Certiorari, p. 2. None of her rights, other than equal protection, are implicated. See Hopper v. Barnett, pet. for cert., p. 10. The facts sub judice also go well beyond the facts in the Tate-Morris-Williams trilogy where the revenue-raising statutes failed to further any valid penal objective.

The impact of cases such as Maher v. Roe, ___ U.S. ___, 97 S. Ct. 2376 (1977) on the issue of whether wealth alone is sufficient to create a suspect classification for purposes of equal protection analysis in the context of the criminal justice system is worthy of review.

B. Federal-State Conflict

As another reason why this case merits certiorari review, the petitioner points to the conflict between the Fifth Circuit Court of Appeals, Barnett v. Hopper, 548 F. 2d 550 (5th Cir. 1977), and the Supreme Court of Georgia, Hunter v. Dean, 240 Ga. 214, 239 S.E. 2d 791 (1977). The State agrees that the conflict is a sufficient reason to grant certiorari.

While a conflict between a state court and a federal circuit court may not alone be of sufficient moment to warrant certiorari review, see Rule 19(1)(b), under the circumstances of this case the conflict magnifies the importance of the federal question presented. Of course, the congressional prerequisite of exhaustion of state remedies in the habeas corpus context is premised on legitimate concerns of comity. 28 U.S.C. § 2254(b); see Townsend v. Sain, 372 U.S. 293 (1963).

With the Fifth Circuit and the Supreme Court of Georgia split over the equal protection issue, comity is present in name only. Those in state custody seeking habeas corpus relief on the issue raised herein need not exhaust state remedies because "there is . . . an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b); see Layton v. Carson, 479 F. 2d 1275 (5th Cir. 1973). On the other hand, many defendants incarcerated on the authority of Hunter v. Dean, 240 Ga. 214, 239 S.E. 2d 791 (1977), may, in the words of the petitioner, "never find Barnett's back door." Petition for Certiorari, p. 10.

In the final analysis, if the Fifth Circuit's position is correct, some Georgia defendants may be incarcerated contrary to the equal protection clause. Similarly, if the position of the Supreme Court of Georgia is correct, in many cases the local federal courts will improperly intrude on the State prerogative of fashioning appropriate sentences. Only this Court can definitely resolve the issue, a difficult issue that confronts trial judges, state and federal, across the nation.

Respectfully submitted,

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